Supreme Court, U.S.
FILED

No. 01 462 SEP 10 2001

IN THE

Supreme Court of the United States

CAROL J. WAITE,

Petitioner,

v.

PATCH PRODUCTS, INC.,
BIG FUN A GO-GO, INC.,
DAVID YEARICK,
TIMOTHY WALSH,
EDWARD J. MUCCINI,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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Question Presented For Review

Did the United States Circuit Court for the Sixth Circuit err reversibly by affirming summary judgment in favor of respondents on the ground that petitioner's registered copyright is not enforceable because it involved ideas, words and related forms of expression that are not properly afforded protection under the copyright act?

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Statement of the Basis for Jurisdiction

This Petition for Writ of Certiorari seeks review of the Opinion entered in this cause by the United States Court of Appeals for the Sixth Circuit on June 12, 2001.

The statute that confers jurisdiction on this Court to review this matter is 28 U.S.C. § 254.

Statute Involved in the Case

17 U.S.C. § 501. Infringement of copyright

(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 121, or of the author as provided in section 106A(a), or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright or right of the author, as the case may be. For purposes of this chapter (other than section 506), any reference to copyright shall be deemed to include the rights conferred by section 106A(a). As used in this subsection, the term "anyone" includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this title in same manner and to the same extent as any nongovernmental entity.

(b) The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of section 411, to institute an action for any infringement of that particular right committed while he or she is the owner of it. The court may require such owner to serve written notice of the action with a copy of the complaint upon any person shown, by the records of the Copyright Office or otherwise, to have or claim an interest in the copyright, and shall require that such notice be served upon any person whose interest is likely to be affected by a decision in the case. The court may require the joinder, and shall permit the intervention, of any person having or claiming an interest in the copyright.

Statement of the Case

This petition seeks review of a judgment of the United States Court of Appeals for the Sixth Circuit. Pursuant to Supreme Court Rule 14.1(g)(ii), and as noted by the district judge in this cause (see Appendix *infra*, p. 12) the basis for federal jurisdiction in this cause is both federal question and diversity jurisdiction.

Petitioner Carol J. Waite ("petitioner") accepts and incorporates herein the representations of proceedings and facts contained in both the opinion of the district court and the opinion of the circuit court appended hereto. This concise synopsis will briefly elaborate those proceedings and facts to assist this Court's review of this petition.

This is a copyright infringement action pursuant to 17 U.S.C. § 501. Petitioner is the creator and owner of a word association game called Common Ground. Respondents are the owners, creators and manufacturers of a word association game called Tribond.

Both Common Ground and Tribond require participants to make associations between three-word clue sets written on a game card. Common Ground requires the participant to identify a shared characteristic for each of the three two-word combinations that can be made from the clue set. Tribond requires the participant to identify a shared characteristic between all three words on the card.

Petitioner created Common Ground between December of 1987 and early 1989. Petitioner applied for a copyright for Common Ground, and received an official certificate of copyright registration on September 14, 1989.

Respondents Yearick, Walsh and Muccini claim to have created Tribond in 1989. These respondents received an official certificate of copyright registration for Tribond on April 23, 1990.

On June 24, 1989, petitioner contacted former defendant Andrew Levison, a Pennsylvania attorney specializing in licensing and product development, and sent him her notebook containing Common Ground. Levison

thereafter contacted former defendant Jim Ward, an employee of a game-manufacturing company, who declined to market Common Ground. Petitioner and Levison thereafter terminated their relationship and petitioner asked that Levison return her materials. Petitioner was forced to contact Levison in writing three times before she finally got her materials back in March of 1990. Petitioner thereafter ceased her attempts to market Common Ground.

In 1995, petitioner became aware of Tribond, which had been marketed commercially and was being advertised on television. Petitioner purchased Tribond and undertook an intensive comparison analysis of the specific word relationships employed in the two games. She discovered that 292 of the 300 Tribond clue cards have words or word relationships which were previously copyrighted by Common Ground.

Petitioner initiated this action in the United States District Court for the Western District of Michigan, alleging copyright infringement and cognate state law claims of unfair competition and conversion. In support of her claim, petitioner retained an expert statistician, Daniel Tholen, who spent over one hundred hours analyzing the two games and filed a report concluding that "the commonality of words, the identical sequence numbers, and the similarity of uses (slang and definitions) point to a pattern of similarity that, if random, was extremely remarkable." Mr. Tholen concluded that the joint probability that the measurable similarities between the two games occurred by chance was .0000000000008.

Petitioner asserted that the overwhelming similarity between the two games compelled the conclusion that Levison had made her game available to Yearick, Walsh and Mussini, and that they had copied her game wholesale while making certain cosmetic changes to enhance marketability. In this regard, petitioner moved the district court to require that Yearick, Walsh and Mussini provide her with fingerprint exemplars to compare with fingerprints found on her notebook after it was returned by Levison.

On February 7, 2000, Magistrate Judge Joseph G. Scoville granted the motion, and the defendants subsequently forwarded the exemplars.

While discovery was ongoing, and before petitioner could secure a fingerprint comparison analysis, defendants moved for summary judgment pursuant to Fed. R. Civ. P. 56(c). On March 7, 2000, the motion was granted by an Opinion and Order entered by the Hon. Robert Holmes Bell, United States District Judge.

Petitioner thereafter appealed to the United States Court of Appeals for the Sixth Circuit. On June 12, 2001, that court entered its Opinion affirming the judgment of the district court.

Petitioner now asks this Court to issue its writ of certiorari to the circuit court.

Further facts will be recited hereafter as necessary to elaboration of argument.

Argument

The district court granted summary judgment in this cause on one specific ground, and the circuit court affirmed that judgment on a different ground. The result is that petitioner has been doubly prejudiced: the circuit court erred as matter of law on the ground it decided, and further deprived petitioner of fair review on the ground depended on by the district court.

Respondents moved the district court for summary judgment on four asserted grounds, and the court expressly granted the motion on one ground only, finding "dispositive" its conclusion of fact that the two games were not "substantially similar" to support a claim of copyright infringement. Having reached this holding, the district court then gratuitously included various "brie[f]" dicta pronouncements on respondents' other three asserted grounds "for purposes of completeness in the event of an appeal".

On appeal, the circuit court paid lip service to "agree[ing]" with the district court's ruling on substantial similarity, while formally ruling that summary judgment is required in this cause as a matter of law based on the ostensible inapplicability of copyright in the context presented:

> Waite is claiming protection of the Common Ground prototype for which she received a certificate of copyright registration in September of 1989. As a general rule of copyright law, "ideas themselves and general concepts are not copyrightable." *Mihalek*, 814 F.2d at 294. Rather, it is the "expression of ideas" that are afforded protection. *Wickham v Knoxville Int'l Energy Exposition, Inc.*, 739 F.2d 1094, 1097 (6th Cir. 1984). Furthermore, "the copyright law does not protect fragmentary words and

> phrases and forms of expression dictated solely by functional considerations." *Sem-Torq, Inc. v. K Mart Corp.*, 936 F.2d 851, 854-55 (6th Cir. 1991) (internal quotation marks and citations omitted). **The idea of creating a game that tests the players' ability to divine a relationship between words is thus not subject to protection under the copyright laws. This is why** Waite's statistical evidence showing the similarity in the sequences and uses of certain words in Tribond and Common Ground is not persuasive in proving a substantial similarity between the two games themselves. [Emphasis added].

This truncated and overgeneralized analysis by the circuit court as to the inapplicability of copyright to "ideas" and "words" is both incorrect as a matter of law, and inapplicable to the facts of this case.

Firstly, the circuit court has committed obvious error in this case in opining that petitioner has attempted to wrongfully copyright an "idea" rather than a creative "expression" of that idea. The circuit court founded its affirmance on the ground that "[t]he idea of creating a [word relationship] game" is not copyrightable. However true this may be as a general proposition, it is wholly irrelevant to this case. Petitioner did not seek to copyright the encompassing idea of word relationship games, generally, but instead presented for copyright protection a specific and precise **expression** of that general idea, i.e., the game Common Ground, with its unique words and word associations, creatively organized. In short, nobody (include petitioner) disagrees that an "idea" is not copyrightable. However, this is simply not what happened in this case.

The circuit court has committed an equally manifest error in applying to this case a rule that certain "words and phrases" are not copyrightable (i.e., "fragmentary words

and phrases and forms of expression dictated solely by functional considerations"). The circuit court derives this rule from its own prior opinion in *Sem-Torq, Inc. v. K Mart Corp.*, 936 F.2d 851 (6th Cir. 1991). However, *Sem-Torq* was a "compilation" case subject to the limited subsection of the copyright act dealing with compilations, i.e., the collecting of preexisting materials. Moreover, *Sem-Teq* involved two competing sets of commercial signs with legends such as "For Sale" or "For Rent", and petitioner Sem-Teq conceded "that its individual signs lack sufficient originality. . .". In that context involving "fragmentary words and phrases" that were "solely dictated by functional considerations", the circuit court found copyrightability to be lacking. It is abundantly clear, however, that the instant case is so entirely different from *Sem-Teq* that the circuit court's reliance on that opinion defies credibility.

If the circuit court's opinion in this case is to taken as expressing some general rule that "words and phrases" are not copyrightable, that rule is contrary to both prior rulings of the same court and rulings of other federal courts. In *Mihalek Corp. v. Michigan*, 814F.2d 290 (6th Cir. 1987), cited by the circuit court in this case, the plaintiff claimed that his copyrighted "Michigan is Good News" logoed materials were infringed by the State of Michigan's "Say Yes to Michigan" campaign of similar items. The circuit court affirmed summary disposition in that case not on the basis that words and phrases are not copyrightable, but on the independent basis that the two groups of materials were not substantially similar.

In *Matthews v. Freedman*, 157 F.3d 25 (1st Cir. 1998), the circuit court evaluated two t-shirts with similar variations of "someone who loves me went to Boston and got me this shirt." The court affirmed summary disposition for defendant, but not on the ground that the words were not copyrightable, but instead on the ground that the words were substantially similar expressions of "the same idea".

In *Sweet v. City of Chicago*, 953 F. Supp. 225 (N.D. Ill. 1996), the court compared plaintiff's "Eat Your Art Out,

Chicago" guide book with the City's "Eat Your Art Out" art fair. In this instance, the court granted summary disposition not on the issue of substantial similarity of the idea involved, but by application of a rule that "titles and short phrases" such as "slogans" are not copyrightable, citing *inter alia Alberto-Culver Co. v. Andrea Duman, Inc.*, 466 F.2d 705, 711 (7th Cir. 1972), and *CMM Cable Rep, Inc. v Ocean Coast Properties, Inc.*, 97 F.3d 1504, 1519 (1st Cir. 1996).

In *Lipton v. The Nature Co.*, 71 F.3d 464 (2nd Cir. 1995), the circuit court affirmed a summary judgment granted in favor of plaintiff on his copyright infringement action. Plaintiff asserted that the arrangement of collective animal terms in his copyrighted book had been appropriated nearly verbatim by defendant and incorporated onto various products, including a poster and a scarf. While the involved terms were a "mere" compilation of established terms not originated by plaintiff, his arrangement of them was found by the circuit court to demonstrate the minimal creativity required for copyright protection. The court then found the arrangement of terms on defendant's product to be so (p. 472) "strikingly similar" with plaintiff's arrangement "to preclude an inference of independent creation". Were this same rule to have been applied in the instant case to the equally striking similarity between the clue sets of Common Ground and Tribond, the district court should have granted (and the circuit court affirmed) summary judgment in favor of petitioner rather than respondents.

The circuit court's opinion in the instant case, compared and contrasted with the cited authorities, reveals significant confusion regarding the interplay of the varying concepts concerning the copyrightability of ideas, the expression of ideas, and the use of words and phrases, generally. This Court should grant certiorari in this case to resolve these very important questions in the rapidly evolving law of intellectual property.

The existing confusion is particularly acute relative to the vital and fundamental distinction between an "idea"

and the "expression" of that idea, the distinction on which the circuit court ran aground in the instant case. This conundrum was most famously expressed by Judge Learned Hand: "Nobody has ever been able to fix that boundary, and nobody ever can." *Nichols v. Universal Pictures, Corp.*, 45 F.2d 119, 121 (2nd Cir. 1930). Unfortunately, the problem has not been solved over the ensuing seven decades, but has become significantly worse over that time, being exacerbated even further by the burgeoning complexities arising out of computer programming issues.

The Second Circuit has adopted an "abstraction-filtration" test to distinguish between idea and expression. *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693 (2nd Cir. 1992). The Third Circuit has adopted a "structure, sequence, and organization" concept to make the necessary distinction. *Whelan Associates v. Jaslow Dental Laboratory*, 797 F.2d 1222 (3rd. Cir. 1986). The Ninth Circuit has adopted an "extrinsic-intrinsic" test to distill the unprotected idea from the protected expression. *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977). By its opinion in the instant case, it is apparent that the Sixth Circuit has no particular vision of the boundary line between idea and expression, stating only that "ideas themselves" are not copyrightable and "expressions of ideas" are "afforded protection."

***

As noted above, the district court granted summary judgment to defendant by making the factual determination that there was no substantial similarity between Common Ground and Tribond. It is perfectly settled law that summary judgment is an extraordinary remedy that should only be granted when, viewing the evidence and all justifiable inferences therefrom in the light most favorable to the opposing party, that no reasonable jury could return a verdict for that party. *Matsushita Elec. Indus. Co. v. Zenith*

Radio Corp., 475 U.S. 574, 587 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). It is equally settled that summary judgment is to be granted sparingly in copyright infringement cases. *Arnstein v. Porter*, 154 F.2d 464 (2nd Cir. 1946). Viewed in light of these stringent standards, the district court clearly erred in finding no substantial similarity where the evidence in this case, viewed strictly from petitioner's perspective, was equally compelling as that found adequate by the Second Circuit to warrant summary judgment for the plaintiff in *Lipton, supra.*

In its review of this case, the circuit court compounded the error by subsuming the entire (factual) "substantial similarity" issue under the supervening umbrella of the (legal) "idea v. expression" issue. It is precisely and only because the circuit court found Common Ground to constitute unprotected "idea(s)" and/or "words" that it declined to fairly review the substantial similarity issue. In the court's own words, "this is why" petitioner could not show similarity—the "this" being the court's conclusion that the game was not copyrightable, a flat and unvarnished error of law.

Consequently, petitioner was denied her right to a genuine review of the basis on which the district judge granted summary judgment against her. Moreover, that error is uncorrectable unless this Court grants certiorari, reverses the Sixth Circuit on its error of law, and then remands this cause to that court to perform its duty of reviewing the district court's action in light of the applicable standard of review and the established record in this case.

* * *

In *Mazer v. Stein*, 347 U.S. 201, 217 (1954), this Court stated the general rule with indelible clarity: "Unlike a patent, a copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea - not the idea itself." Unfortunately, however, this general rule has proven inadequate to assisting the bench

and bar in drawing the necessary line between "idea" and "*expression*". *Some courts, like the Sixth Circuit, have not* undertaken to adequately grapple with this profoundly important issue. Other courts, like the Second, Third and Ninth Circuits, have tried to draw the line, but have reached expressly disparate and incompatible results.

As this Court is well aware, the entire area of intellectual property is exploding in significance as our society continues to experience the paradigm shift to the information age. It is due and overdue for this Court to address the critical issue of "idea" versus "expression", and establish appropriate guidelines for the courts below to resolve this vital issue. Petitioner respectfully asserts that the instant case provides a suitable vehicle for this Court to address this issue, and accordingly respectfully requests that this Court address its Writ of Certiorari in this cause to the United States Court of Appeals for the Sixth Circuit.

September 7, 2001

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CAROL J. WAITE,

Plaintiff, Case No. 1:98-CV-857

v. HON. ROBERT HOLMES BELL

PATCH PRODUCTS, INCORPORATED, a Wisconsin corporation, BIG FUN A GO-GO, INCORPORATED, a New York corporation, DAVID YEARICK, TIMOTHY WALSH, EDWARD J. MUCCINI, ANDRES J. LEVISON, ESQ., and JIM WARD,

Defendants.
_____/

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O R DE R

In accordance with the opinion entered this date,

IT IS HEREBY ORDERED that the Defendants' Motion for Summary Judgment (Docket #39) is **GRANTED.**

IT IS FURTHER ORDERED that **JUDGMENT** is entered in favor of the **DEFENDANTS,**

Date: March 7, 2000

s/Robert Holmes Bell
ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CAROL J. WAITE,

Plaintiff, Case No. 1:98-CV-857

v. HON. ROBERT HOLMES BELL

PATCH PRODUCTS, INCORPORATED, a Wisconsin corporation, BIG FUN A GO-GO, INCORPORATED, a New York corporation, DAVID YEARICK, TIMOTHY WALSH, EDWARD J. MUCCINI, ANDRES J. LEVISON, ESQ., and JIM WARD,

Defendants.
_____/

OPINION

The Plaintiff, Carol J. Waite, commenced this copyright infringement action pursuant to 17 U.S.C. § 501 against the Defendants, Patch Products, Inc., Big Fun A Go-Go, Inc., David Yearick, Timothy Walsh, Edward J. Muccini, Andrew J. Levison and Jim Ward.[1] The suit alleges that the Defendant's game, Tribond, infringes the Plaintiff's registered copyright for her game, Common Ground. In addition to copyright infringement, the complaint alleges state law claims of unfair competition (Count II) and conversion (Count III).[2] Before the Court is the Defendant's

[1]Levison and Ward have been dismissed. See docket # 8, 22.
[2]The Court has both federal question and diversity jurisdiction.

motion for summary judgment. For the reasons stated herein, the Court grants the motion.

I

The plaintiff alleges that between December 1987 and the fall of 1989, she developed a word relationship game entitled Common Ground. On September 14, 1989, she obtained a copyright registration.[3] The Plaintiff's word game presents a set of three words. Participants are required to form three sets of two word combinations and to identify a shared characteristic for each of the two word sets. For example, the Plaintiff's game contains the following three word set: duck, mouse and snake. According to the Plaintiff, the correct answers would be:

1. Micky Mouse and Donald Duck are famous cartoon characters, a snake is not.
2. A duck and a snake both lay eggs, a mouse does not.
3. A mouse and a snake both cannot fly, a duck can.

According to the instructions, the goal of the game is to be the first player to spell Common Ground by turning over one of twelve cards each time the player successfully names a shard characteristic for any of the two word sets.

In 1989, Waite contacted Levison, an attorney, with the intent that he show the game to Ward, an employee of a game manufacturing company. She alleges that she discussed marketing strategies for Common Ground with Levison.[4] When Levison advised her that Ward was not interested in the game, they terminated their relationship. Although Waite requested her game back from Levison at that time, She did not receive it until a few months later.[5]

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[3]Compl. ¶11.
[4]Compl. ¶17.
[5]Compl. ¶18.

Yearick, Walsh and Muccini assert that they created Tribond in 1989. The Defendants' game is a board game which uses word association concepts to challenge the participants. A Tribond player is given a series of three-word clue sets identified by category and must identify the shared characteristic or "bond" between the three words. For purposes of illustration, under the Arts category, a three word set is Walker, Whitney, and Guggenheim. The correct answer is "art museums". By correctly identifying the shared characteristic, the participant is allowed to move one of his game pieces along the game board. The object of the game is to bring three game pieces out of the center triangle, along their respective paths and back to the center triangle by correctly answering or bonding the Tribond clue sets.[6]

Yearick, Walsh and Muccini formed a company called Big Fun A Go-Go, Inc. ("Big Fun"). On April 23, 1990, Big Fun received a certificate of copyright registration for Tribond.[7] They hired Patch Products to manufacture the first 2,500 Tribond games. From February 1990 to December 1992,[8] Patch Products manufactured Tribond, Travel Tribond and Tribond for Kids. In 1992, Walsh contacted Patch Products and convinced them to join forces. Thereafter, Patch Products purchased the rights to Tribond from Big Fun.[9] Walsh became the vice president of marketing for Patch Products and together they sold 12,500 games that year.

In December 1998, the Plaintiff commenced this action, asserting that Tribond is substantially similar to Common Ground.[10] She asserts that the Defendants copied a large percentage of the words and word relationships in Common Ground and offers, as evidence, a report from a statistician that the commonality in words demonstrated a

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[6]Defs' Mtn for SJ at 4-5.
[7]Compl. ¶24.
[8]Compl. ¶25.
[9]Compl. ¶26.
[10]Compl. ¶21.

pattern of similarity.[11]

II

The Defendants move for summary judgment on the grounds that: (1) the Plaintiff's copyright infringement claim fails as a matter of law because the subject matter is not protectible; (2) the Plaintiff has failed to establish access; (3) no issue of material fact exists as to whether the Defendants independently created Tribond; and (4) Tribond is not substantially similar to Common Ground, Although the Court finds the issue of substantial similarity dispositive, for purposes of completeness in the event of an appeal, the Court briefly addresses the Defendants' alternative grounds.[12]

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. In evaluating a motion for summary judgment the Court must look beyond the pleadings and assess the proof to determine whether there is a genuine need for trial. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The Court views the evidence in the light most favorable to the opposing party and draws all reasonable inferences in his favor. Morales v. American

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[11]Compl. ¶23. The Defendants have submitted their own expert report, challenging the methodology of the Plaintiff's statistical analysis.

[12]The Plaintiff opposes the Defendants' motion on the grounds that factual issues remain outstanding. Even applying the more "liberal" pleading standard applicable to the Plaintiff's argument because she is appearing pro se does not help her cause. The Court has reviewed her brief and concludes that none of the issues raised are material. While courts must apply "less stringent standards" in determining whether pro se pleading state a claim for which relief can be granted, Estelly v Gamble, 429 U.S. 97, 106, 97 S.Ct. 285, 292, 50 L.Ed.2d 251 (1976), pro se plaintiffs are not automatically entitled to take every case to trial. Pilgrim v. Littlefield, 92 F.3d 413, 416 (6th Cir. 1996).

Honda Motor Co. Inc., 71 F.3d 531, 535 (6th Cir. 1995). If Defendants carry their burden of showing there is an absence of evidence to support a claim then the Plaintiff must demonstrate by affidavits, depositions, answers to interrogatories, and admissions on file, that there is a genuine issue of material fact for trial. Celotex Corp. v. Catrett, 477 U.S. 324-25, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The mere existence of a scintilla of evidence in support of Plaintiff's position is not sufficient to create a genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The proper inquiry is whether the evidence is such that a reasonable jury could return a verdict for Plaintiff. Id. See generally, Street v. J.C. Bradford & Co., 886 F.2d 1472, 1476-80 (6th Cir. 1989). In this case, the Court is persuaded that no genuine issue as to any material fact exists and that the Defendants are entitled to judgment as a matter of law.

"To establish copyright infringement, a plaintiff must show: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." Ellis v. Diffie, 177 F.3d 503, 506 (6th Cir. 1999) (internal quotations marks omitted). Direct evidence of copying is rare, so frequently the plaintiff will attempt to establish an inference of copying by showing: (1) access to the allegedly-infringed work by the defendants and (2) a substantial similarity between the two works at issue. Robert R. Jones Associates, Inc. .v. Nino Homes, 858 F.2d 274, 276-77 (6th Cir. 1988); Wickham v. Knoxville Int'l Energy Exposition, 739 F.2d 1094, 1097 (6th Cir. 1984); see 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 13.02[B] (revised 1998).

Circumstantial evidence is sufficient to establish access. All that is required is a reasonable possibility that the Defendants had an opportunity to see or hear the protected work. Robert R. Jones Associates, Inc., 858 F.2d at 277 ("access merely means an opportunity to view the protected work"). The evidence to support a finding of

access, however, must extend beyond "mere speculation or conjecture. Ellis, 177 F.3d at 506.

As an initial matter, to prove unlawful copying, the Plaintiff must first establish the protected expression of the copyrighted work. A copyright only protects a particular expression of an idea and not the idea itself. Mazer v. Stein, 347 U.S. 201, 218, 74 S.Ct. 460, 471, 98 L.Ed. 630 (1954). Thus, ideas contained in a copyrighted work may be freely used so long as the copyrighted expression is not wholly appropriated. Allen v Academic Games League of America, Inc., 89 F.3d 614, 618 (9th Cir. 1996). Therefore, to the extent that Waite's action alleges infringement of an idea or a general concept for a word game based on identifying a shared characteristic, rather than the expression of the idea or general concept, there is no copyright protection for the premises or ideas underlying her game. See Mazer, 347 U.S. at 217; Mihalek Corp., 814 F.2d at 294.

Waite's complaint can also be understood as seeking protection of the words and word phrases contained in Common Ground.[13] She proffers statistical evidence that a majority of the word relationships and words in Common Ground are also found in Tribond.[14] Words and phrases, however, are not subject to protection under the Copyright Act. Sem-Torq, Inc. v. K Mart Corp., 936 F.2d 851, 854-55 (6th Cir. 1991); Homan v. Clinton, 187 F.3d 635 (table), No. 98-3844, 1999 WL 430446, at *2 (6th Cir. Jun. 14, 1999).

The Plaintiff fails to establish that the Defendants had access to common ground.[15] See Wickham, 739 F.2d at

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[13]Compl. ¶22.

[14]See Pl's Br. in Opp'n, Exh. 1, & 2. Waite asserts that "292 out of 300 Tribond clue cards have Common Grounds' copyrighted words or word relationships on them." Exh. 27. She further asserts that 5 out of 9 of Common Ground's famous names appear in Tribond.

[15]On February 7, 2000, Magistrate Judge Joseph G. Scoville granted the Plaintiff's motion requesting the Defendants' fingerprints. Docket # 53. The Plaintiff has not sought to oppose the Defendants' motion on the basis of fingerprint evidence. As will be shown, however, this evidence, should it exist, does not alter the outcome because of the Court's conclusion that substantial similarity between the two games is lacking.

1097. According to Waite, Levison was the only person that had access. There is no evidence demonstrating any nexus between Levison and the Defendants from which the Court could surmise that they had access to Waite's game. Moreover, the Defendants proffered detailed and specific evidence of their independent creation of Tribond. "[A]n inference of copying is rebuttable by evidence of independent creation of the allegedly infringing work." Ellis, 177 F.3d at 507. According to their affidavits, they began work on Tribond in 1989 and had a prototype ready as of July 1989. The Plaintiff has failed to demonstrate the existence of a genuine issue of material fact concerning access. Celotex Corp., 477 U.S. at 324-25.

Even if the Plaintiff could establish that the Defendants had access to her game, she can not meet her burden of proving substantial similarity between her work and the Defendants' game. See Mihalek, 814 F.2d at 294; Wickham, 739 F.2d at 1097. In analyzing whether the works were substantially similar, the Court applies the "ordinary observer" test, which is the traditional standard of copyright infringement. Ellis, 177 F.3d at 506. "The ordinary observer test requires the trier of fact to gauge the similarities of the two works solely on the basis of his 'net impression' and without relying on expert analysis or dissection." Id. at 506 n.2.

Having carefully examined the exhibits comparing the games, the Court concludes that, as a matter of law, an average reasonable layperson upon such examination could not find the requisite substantial similarity to establish copyright infringement. Tribond's use of the words and the context in which they are used are very different than in Common Ground. The linking concept is also different between the two games. In Tribond, the distinguishing feaeture is the common concept or link that the three clues share. In Common Ground, a player must make 3 two word sets and is only required to link two words.

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15 [cont] "No amount of proof of access will suffice to show copying if there are no similarities." Wickham, 739 F.2d at 1097.

While summary judgment should be granted sparingly in copyright infringement cases, "a court may compare the two works and render a judgment for the defendants on the ground that as a matter of law a trier of fact would not be permitted to find substantial similarity." Wickham, 739 F.2d at 1097. See also Mihalek Corp., 814 F.2d at 294 ("[a] finding of substantial differences between the copyrighted material and the alleged copy has been found to justify a judgment for the defendants in copyright infringement proceedings"). Accordingly, the Court grants the Defendants' motion as to Count I.

III

In her unfair competition claim, the Plaintiff asserts that the Defendants copied her game and the sales strategies she suggested. She further alleges that Defendants' alleged unauthorized appropriation deceives the purchasing public and results in deceptive advertising.[16]

"Ordinarily, one simply cannot be found guilty of unfair competition when the facts indicate no competition." Murray Hill Publications, Inc. v. ABC Communications, Inc., 67 F. Supp.2d 754, 763 (E.D. Mich. 1999) (internal quotation marks omitted). The Plaintiff is not in competition with the Defendants. Rather, she alleges that the Defendants improperly accrued economic benefits by copying her game. Regardless, the Plaintiff's unfair competition claim is preempted because it is equivalent to her copyright infringement claim. Id.; Meyer v Giles, No. 4:92-CV-115, 1992 WL 489770, at *2-3 (W.D.Mich. Nov. 30, 1992).

The Plaintiff's final claim is one of conversion. Michigan law defines conversion "as 'any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein.'" Sarver v. Detroit Edison Co., 225 Mich.App. 580,

[16]Compl. ¶¶38-41.

585, 571 N.W.2d 759, 761 (1997) (quoting Foremost Ins. Co. v Allstate Ins. Co., 439 Mich. 378, 391, 486 N.W.2d 600, 606 (1992)). "Courts have generally held that conversion claims based upon possession or use of rights protected by § 106 of the Copyright Act are preempted . . . unless the plaintiff alleges the extra element that the defendant unlawfully retained the physical object embodying the plaintiff's work." Wrench LLC v. Taco Bell Corp., No. 1:98-CV-45, 1998 WL 480871, at *7 (W.D.Mich. Jun. 18, 1998) (citing United States ex rel. Berge v. Board of Trustees of the University of Alabama, 104 F.3d 1453, 1463 (4th Cir. 1997) (citations and internal quotation marks omitted). Although Plaintiff alleges that the "Defendants took [her] property without permission,"[17] there is no evidence that they ever had access to Common Ground, much less possession of it. Therefore, her conversion claim is preempted.

IV

As a final matter, the Court considers the Defendants' request that the Court award them their costs and attorney fees. Section 505 of the Copyright Act providess that "the court in its discretion may . . . award a reasonable attorney's fee to the prevailing party." 17 U.S.C. § 505. The Supreme Court has identified "several nonexclusive factors that courts could consider in making awards of attorney's fees to any prevailing party," including "frivolousness, motivation, objective unreasonableness (both in fact and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence." Fogarty v. Fantasy, Inc., 510 U.S. 517, 535 n.19, 114 S.Ct. 1023, 1033 n.19, 127 L.Ed.2d 455 (1994).

In Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 349-50, 111 S.Ct. 1282, 1289, 113 L.Ed.2d 358 (1991), the Supreme Court stated that the primary

[17]Compl. ¶44.

objective of the Copyright Act

> is not to reward the labor of authors but to promote the Purposes of Science and useful Arts. . . . To this end, copyright assures authors the right to original expression, but encourages others to build freely upon the ideas and information conveyed by a work.

(citation and quotation marks omitted). "[C]opyright law ultimately serves the purpose of enriching the general public through access to creative works . . . ." Fogerty, 510 U.S. at 527.

Having considered the relevant factors in the context of the case presented, the Court declines to award costs and attorney fees. She commenced her complaint represented by counsel. The legal theories and claims were advocated by counsel. Although the Plaintiff's claims were meritless, the Court is not convinced that the claims were not, to the best of the Plaintiff's knowledge, warranted by existing law. In addition, the Court is unpersuaded that imposing attorney fees will further the interests of the Copyright Act.

An order and judgment consistent with this opinion will be entered.

Date: March 7, 2000

s/Robert Holmes Bell
ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

NOT RECOMMENDED FOR PUBLICATION

Nos. 00-1292, 00-1333

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CAROL J. WAITE, Plaintiff-Appellant, v. PATCH PRODUCTS, INC., BIG FUN A GO-GO, INC., DAVID YEARICK, TIMOTHY WALSH, and EDWARD J. MUCCINI, Defendants-Appellees, ANDREW J. LEVISON, ESQ., and JIM WARD, Defendants.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN **OPINION** FILED JUNE 12 2001 LEONARD GREEN, Clerk

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.
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Before: GUY, NORRIS, and GILMAN. Circuit Judges.

RONALD LEE GILMAN, Circuit Judge. Carol J. Waite, a resident of the state of Michigan and the owner of a registered copyright for a word game called Common Ground, sued the manufacturer, owner, and creators of a commercially distributed word game called Tribond. Waite initiated her action in federal court pursuant to 17 U.S.C. § 501, claiming that Tribond infringed on her copyright for Common Ground. She also raised state-law claims of unfair competition and conversion. The defendants filed a motion for summary judgment, which the district court granted. Waite appeals, arguing that she presented sufficient evidence to survive summary judgment. The defendants cross-appeal, claiming that the district court erred in denying their request for attorney fees and costs. For the reasons set forth below, we **AFFIRM** the judgment of the district court.

I. BACKGROUND

In December of 1987, while playing a board game that Waite found boring, she made an entrepreneurial decision to create a mentally challenging word game. Waite was inspired by a game that she played as a child while traveling by car with her family. Her father would pick two words and ask what they had in common. For example, he once asked "What do McDonald's and your feet have in common?" Waite prides herself for always having been quick to respond. In the McDonald's example, the answer was "arches".

Between December of 1987 and the fall of 1988, Waite developed several hundred word relationships and conceptualized a game that she named "Common Ground." According to the game's prototype, each question consists of a set of three words that are written on a game card. A participant must identify a shared characteristic for each of the two-word combinations that can be made from the three words. The following example illustrates her game. Given

a three-word set consisting of the words "duck, mouse and snake," a participant should guess these three relationships between the words: (1) Micky Mouse and Donald Duck are famous cartoon characters, a snake is not; (2) a duck and a snake both lay eggs, a mouse does not; (3) neither a mouse nor a snake can fly, a duck can. To win the game, a player must be the first to spell "Common Ground" by turning over one of twelve cards after successfully naming a shared characteristic of any of the two-word sets from the three words given on a card.

By mid-1989, Waite's development of the game had progressed to the point where she decided to copyright her work. She hired Andrew J. Levison, an attorney in Pennsylvania who specialized in the business of licensing and product development, in August of that year. They exchanged ideas on marketing strategies and on how to expand the game. Waite applied for a copyright for Common Ground, receiving an official certificate of copyright registration on September 14, 1989.

Waite and Levison agreed that Levison would present Common Ground to Jim Ward, an employee of a game-manufacturing company called TSR, Inc., to assess its marketing potential. Levison advised Waite to develop more word relationships to improve the game's marketability. Waite subsequently sent Levison her notebook that contained the word relationships she had developed from her brainstorming. Soon thereafter, Waite and Levison agreed to terminate their business relationship. Waite insisted that Levison return her notebook. Aalthough Levison told Waite that he had sent the notebook to her in January of 1990, Waite did not actually receive it from him until two months later, after she had requested it in writing three times.

Having failed in her attempt to market Common Ground, Waite decided not to pursue the idea any further. Over five years later, however, she received a call from a relative of hers, who told Waite that her game was being advertised on television. This was in December of 1995.

Waite went to a toy store and purchased a 1989 copyrighted version of the game Tribond. After spending countless hours analyzing Tribond, Waite became convinced that Tribond had appropriated her original work that she had produced for Common Ground.

The game Tribond consists of cards that lists categories of three-word clue sets. A participant must guess the correct association, or bond, between the three words. For example, one three-word set under the category of "Arts" gives the clue "Walker, Whitney and Guggenheim." The correct answer, being the bond between them, is "art museums." By answering correctly, players move their game pieces along a board. The first to get to the game board's end point is the winner.

David Yearick, Timothy Walsh, and Edward J. Muccini, formerly fraternity brothers at Colgate University, created Tribond in 1989. They formed a company called Big Fun A Go-Go, Inc., which applied for and received a certificate of copyright registration for Tribond on April 23, 1990. Patch Products, Inc. contracted with Big Fun A Go-Go to manufacture the first 2,500 Tribond games. Yearick, Walsh and Muccini also created different versions of their game, such as Travel Tribond and Tribond for Kids. In 1992, Patch Products bought the rights to Tribond from Big Fun A Go-Go. Patch Products has continued to manufacture and market Tribond and its affiliated games ever since. The three creators of Tribond have consistently denied having had any contact or knowledge of Waite, Levison, Ward, or the game Common Ground.

Waite filed suit in federal court in December of 1998. Named as defendants were Yearick, Walsh, Muccini, Patch Products, Big Fun A Go-Go, Levison and Ward. Waite claimed that because Tribond is substantially similar to Common Ground, it infringes on her copyright. She sought relief under 17 U.S.C. §§ 503, 504, and 505. Waite also raised state-law claims of unfair competition and conversion. Levison and Ward were dismissed from the proceedings before the district court. The remaining

defendants filed a motion for summary judgment, which the district court granted. Specifically, the district court held that Waite did not produce sufficient evidence to allow any "ordinary observer" to find a substantial similarity between the two games, and that Waite's claim did not even implicate the laws of either unfair competition or conversion. The district court also declined to award costs and attorney fees to the defendants at the conclusion of the lawsuit, finding that although Waite's claims lacked merit, they were nevertheless raised by her counsel in good faith.

Before us now are Waite's appeal from the district court's grant of summary judgment for the defendants and the defendants' cross-appeal challenging the district court's refusal to grant their motion for attorney fees and costs. Waite, now proceeding pro se, argues that the district court errred by determining that she did not present sufficient evidence to establish the elements of copyright infringement.

II. ANALYSIS

A. Standard of review.

We review de novo the district court's grant of summary judgment. *See, e.g., Holloway v. Brush,* 220 F.3d 767, 772 (6th Cir. 2000). Summary disposition is proper when there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In deciding a motion for summary judgment, the court must view the evidence and draw all reasonable inferences in favor of the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). The judge is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986). A genuine issue for trial exists only when there is sufficient

"evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252.

B. Waite has failed to state a claim for copyright infringement.

To establish a claim for copyright infringement, a plaintiff must prove two elements: "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Feist Publ'ns., Inc. v. Rural Tel. Servs., Inc.*, 499 U.S. 340, 361 (1991). In the absence of direct evidence of duplication, "the copyright holder frequently proves copying by showing that the defendant or the person who composed the defendant's work had access to the copyrighted material and that the defendant's work is *substantially similar* to the protected work." *Robert R. Jones Assocs. v. Nino Homes*, 858 F.2d 274, 276-77 (6th Cir. 1988) (emphasis added). The test for substantial similarity is sometimes called the "ordinary observer test." *See Ellis v Diffie*, 177 F.3d 503, 506 n.2 (6th Cir. 1999). A plaintiff bears the burden of proving the substantial similarity between protected material and the allegedly infringing work. *See Mihalek Corp. v. Michigan*, 814 F.2d 290, 294 (6th Cir. 1987).

Waite cites three errors allegedly made by the district court in granting summary disposition for the defendants. First, she argues that the court should have deferred its ruling until she had the opportunity to obtain fingerprint data from the defendants. According to Waite's theory, Levison provided Yearick, Walsh and Muccini with her notebook that contained the prototype of Common Ground, including the word combinations that she had produced through brainstorming from 1987 to 1989. Waite believes that if she had been able to match fingerprint data from the defendants with fingerprints found on the notebook, she would have been able to prove that the defendants had access to her protected work, thereby adducing circumstantial evidence that the defendants copied Common Ground. Second, she disputes the district

court's determination that Common Ground and Tribond are not substantially similar under the ordinary observer test. Third, she argues that the story of Tribond's creation shares too many "coincidences" with her own history with Common Ground, raising a genuine issue of material fact sufficient to survive summary judgment. Waite does not contest the district court's disposition of her state-law claims.

We agree with the district court's conclusion that Waite has failed to carry her burden of raising a genuine issue of material fact regarding the claimed similarity between Common Ground and Tribond. Waite is claiming protection of the Common Ground prototype for which she received a certificate of copyright registration in September of 1989. As a general rule of copyright law, "ideas themselves and general concepts are not copyrightable." *Mihalek*, 814 F.2d at 294. Rather, it is the "expression of ideas" that are afforded protection. *Wickham v Knoxville Int'l Energy Exposition, Inc.*, 739 F.2d 1094, 1097 (6th Cir. 1984). Furthermore, "the copyright law does not protect fragmentary words and phrases and forms of expression dictated solely by functional considerations." *Sem-Torq, Inc. v. K Mart Corp.*, 936 F.2d 851, 854-55 (6th Cir. 1991) (internal quotation marks and citations omitted). The idea of creating a game that tests the players' ability to divine a relationship between words is thus not subject to protection under the copyright laws. This is why Waite's statistical evidence showing the similarity in the sequences and uses of certain words in Tribond and Common Ground is not persuasive in proving a substantial similarity between the two games themselves.

Although Common Ground and Tribond both involve the exercise of identifying common characteristics between words, the goals and strategies of the games are substantially different. From a three-word clue set, for example, Common Ground requires a player to find a commonality between two of the words and a way in which the third word differs, whereas a player in Tribond must

show one common bond between all three words. Tribond has its words grouped in conceptual categories, whereas Common Ground does not. Common Ground consists primarily of cards, whereas Tribond includes an elaborate playing board with game pieces in addition to the question cards.

In sum, there are considerable differences between the two games. "A general impression of similarity is not sufficient to make out a case of infringement." *Mihalik*, 814 F.2d at 295 (internal quotation marks and citation omitted). Additionally, Waite has not produced any evidence that the defendants had access to Common Ground. Her argument that she has produced enough facts to go to trial on this issue is based solely on her conspiracy theory that Levison gave the three Tribond creators her notebook in 1989 and her statistical correlation of selected words common to both games. But "access may not be inferred through mere speculation or conjecture." *Ellis*, 177 F.3d at 506 (original alteration and citation omitted)(upholding the district court's finding that the plaintiff failed to establish access where the district court determined that the evidence presented involved "a somewhat speculative inferential claim").

In the case before us, Levison, on the one hand, and the Tribond creators, on the other, each denied having had any contact between them. Waite produced no evidence to the contrary. The three Tribond creators even provided Waite with their fingerprints. Although Waite complains that the fingerprints were not produced until after the district court had granted summary judgment, she has never engaged an expert to actually compare the exemplars with the fingerprints on her notebook. She thus continues to rely solely on her undocumented suspicion that the Tribond creators had access to her work. Furthermore, as noted by the district court, proof of access is irrelevant if there is in fact no basis for an ordinary observer to find substantial similarity between the two games. We therefore

find no error in the district court's grant of summary judgment to the defendants.

C. The district court did not abuse its discretion in denying the defendants' request for attorney fees and costs.

We now turn to the defendants' cross-appeal, which challenges the district court's decision not to award them attorney fees and costs. According to 17 U.S.C. § 505, "the court in its discretion may . . . award a reasonable attorney's fee to the prevailing party as part of the costs." The district court noted the Supreme Court's directive to take into account factors such as "frivvolousness, motivation, objective unreasonableness (both in the factual and the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence." *Fogerty v Fantasy, Inc.*, 510 U.S. 517, 534 n.19 (1994).

We will not disturb a district court's determiantion regarding the award of attorney fees and costs unless the court has abused its discretion. *See Perrotti v. Seiter*, 935 F.2d 761, 763 (6th Cir. 1991). The district court reasoned that Waite's claims were brought in good faith and were warranted under existing law, even though they were found to be meritless in the end. Given the statute's grant of discretion and the factors that are to be balanced, we cannot say that the district court abused its discretion in declining to award attorney fees and costs to the defendants.

III. CONCLUSION

For all of the reasons set forth above, we **AFFIRM** the judgment of the district court.